No. 12208

United States
Court of Appeals
for the Ninth Circuit

WALTER J. POPOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Typo Press, 1017 California Drive, Burlingame, Calif. 4—4—49

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

MESSRS. HILDEBRAND, BILLS & McLEOD,

1212 Broadway,
Oakland, California,

Attorneys for Plaintiff and Appellant.

MR. FRANK J. HENNESSY,

United States Attorney,
Northern District of California,

Post Office Building,
San Francisco, California.

In the District Court of the United States for the Northern District of California, Southern Division

No. 27710-H

WALTER J. POPOVICH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendant and for cause of action alleges:

I.

That at all times herein mentioned defendant United States of America was engaged in the conduct of an interstate railroad known as Alaska Railroad doing business in the Territory of Alaska and certain states of the United States through its connection with other interstate carriers in the United States.

II.

That the injuries to plaintiff hereinafter complained of arose while plaintiff was an employee of said United States of America acting in the regular course and scope of his duties as an employee of said Alaska Railroad engaged in the conduct of interstate commerce on behalf of the said United States.

III.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq., and the Federal Safety Appliance Act, 45 U.S.C.A. 2, et seq.

IV.

That on or about the 26th day of August, 1946, at or about the hour of 8:00 o'clock a.m. thereof, plaintiff was employed by defendant as a brakeman working on one of defendant's freight trains which was engaged in performing certain switching movements in defendant's railroad yard in the City of Fairbanks, Territory of Alaska.

V.

That at said time and place acting in the regular course and scope of his duties plaintiff was required to and he was engaged in assisting other members of his crew in attempting to couple said train on to a certain cut of three hopper cars; that at said time and place the coupling apparatus of one or both of the two freight cars which were to be coupled together were defective and inefficient in that when the cars were brought together in the regular manner the coupling pin failed to drop; that as a direct and proximate result of said defective and inefficient condition plaintiff then stepped to one of said cars in order to release the lock block; that as a further and proximate result of said defective and inefficient condition and as plaintiff was working with the lock block on one of said cars the three hopper cars were caused to suddenly roll back and catch plaintiff's right arm between the two couplers thereby causing plaintiff to sustain the injuries hereinafter enumerated.

VI.

That at said time and place the couplers between said cars were inefficient in violation of the Federal Safety Appliance Act, 45 U.S.C.A., Section 2.

VII.

That by reason of the facts hereinabove set forth and as a direct and proximate result of the failure of defendant to have said couplers in proper repair as hereinabove alleged, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following injuries, to wit: multiple comminuted compound fractures of the right forearm with resultant deformity of said arm, extreme pain and suffering and a severe shock to his nervous system.

VIII.

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately $300.00 per month; that by reason of the facts hereinabove alleged and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

IX.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as aforesaid, plaintiff has been generally damaged in the sum of $100,000.00.

Wherefore, plaintiff prays judgment against de-

fendant in the sum of $100,000.00, together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

HILDEBRAND, BILLS & McLEOD,

By /s/ C. C. McLEOD,
Attorneys for Plaintiff.

State of California,
County of Alameda—ss.

Charles C. McLeod, being first duly sworn, deposes and says: that he is one of the attorneys for plaintiff in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters that he believes it to be true; that plaintiff is absent from the County of Alameda wherein affiant maintains his offices and that affiant therefore makes this verification on behalf of plaintiff.

/s/ CHARLES C. McLEOD.

Subscribed and sworn to before me this 1st day of October, 1947.

(Seal) /s/ DORIS ANDERSON,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed Oct. 22, 1947.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant United States of America and moves to dismiss the complaint on file herein on the following grounds:

I.

The complaint does not state facts sufficient to constitute a claim against defendant.

II.

The complaint does not state a claim within the jurisdiction of this Court.

III.

It appears from the face of the complaint that the alleged cause of action arose not later than August 26, 1946, and that the complaint was filed on October 22, 1947, more than one year subsequent to the date said alleged cause of action accrued. It is therefore barred by the provisions of Title 28 U.S.C., Sec. 2401, Federal Torts Claims Act, Section 420.

Wherefore defendant prays that the complaint be dismissed.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,

Attorneys for Defendant.

NOTICE OF MOTION

To the plaintiff above named and to Messrs. Hildebrand, Bills and McLeod, Attorneys at Law, 1212 Broadway, Oakland 12, California, his attorneys:

Please Take Notice that the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room 276, Post Office and Court House Building, City and County of San Francisco, California, on the 25th day of October, 1948, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

DEFENDANT'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

The alleged cause of action is against the United States of America. The statutory action of Congress waiving sovereign immunity upon which the jurisdiction of the Court must be based is the Federal Torts Claims Act of 1946, Public Law 601, now

incorporated into Title 28 U.S.C., Sections 1346, 1402 (b), 2401, 2402, 2671 to 2680, and other Sections.

Under Sec. 410(a) of the Federal Torts Claims Act (Title 28 U.S.C., Section 1346, 1402(b) and 2402), the United States District Court for the District wherein plaintiff is resident or wherein the act or omission complained of occurred, including the United States District Court for the Territories and possessions of the United States, has exclusive jurisdiction of plaintiff's claim.

I.

The complaint alleges the Territory of Alaska as the place where the act or omission occurred but contains no allegation as to the residence of the plaintiff.

II.

It appears from the face of the complaint that it was not filed within one year subsequent to August 26, 1946, the time the alleged cause of action arose, and it is therefore barred by Sec. 420 of The Federal Torts Claims Act, 28 U.S.C. 2401.

III.

There can be no question that the jurisdiction of the Court can only be invoked under The Federal Torts Claims Act, Sec. 423, 28 U.S.C. 2679. "The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under Section 1346(b) of this title, and

the remedies provided by this title in such cases shall be exclusive."

It is respectfully submitted that defendant's motion should be granted without leave to plaintiff to amend.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Defendant's motion is made upon the ground that more than a year elapsed following the accident until the complaint was filed. The motion assumes that the action is brought under the Federal Tort Claims Act. The complaint specifically states that the action was brought under the Federal Employers' Liability Act and accordingly as this action is brought under said Act the applicable limitation was, of course, the period of three years from the date of the accident. The important question before the Court is as to whether the United States of America after entering into the business of a common carrier by rail is subject to the terms and provisions of the Federal Employers' Liability Act.

So far as we have been able to ascertain this precise question has never been determined by any of the Federal Courts of the United States. We do believe, however, that certain decisions by such courts make it plain that the United States should be held to come within the terms of such Act and accordingly we wish to call the court's attention to the following decisions and facts:

In the case of the United States v. California, 297 U.S. 175, an action arose out of the attempt of the United States to collect a penalty from the State of California for failure to comply with the terms of the Safety Appliance Act. The subject matter of that action was concerned with the operation by the State of California of the State Belt Line Railroad at San Francisco. The Supreme Court held that the State of California by engaging in such business had subjected itself to all of the provisions regulating other common carriers by rail. The opinion was given by Justice Stone and in part he said:

"The state urges that it is not subject to the Federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of the operation for harbor improvement, . . . it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal act.

"In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

"Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the state is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. . . . A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, . . . as are state agencies created to effect a public purpose. . . . In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

"The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on

taxation by either of the instrumentalities of the other."

"But there is no such limitation upon the plenary power to regulate commerce."

"California, by engaging in interstate commerce by rail has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, . . . and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. . . . The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive this protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.

"In Ohio vs. Helvering, . . . it was held that a state, upon engaging in the business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although states were not specifically mentioned in the statute. The same conclusion was reached in South Carolina vs. United States,

. . . Similarly the Interstate Commerce Commission has regarded this and other state-owned interstate rail carriers as subject to its jurisdiction, although the Interstate Commerce Act does not in terms apply to state-owned rail carriers * * *

"Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, . . . This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. . . . The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. . . . We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial."

Following the decision by the United States Supreme Court in the case of Maurice v. State of Cali-

43 C.A. (2) 270

fornia, ~~an injured employee of the State Belt Rail-~~

Appellate

~~road~~, the ~~Supreme~~ Court of California held that the Federal Employers' Liability Act gave relief to an employee of a State railroad and the action between

the employee and employer was said to be in no way different from the remedy afforded to the employee of a private carrier. It is clear, therefore, that the courts of this land have unequivocably held that at least a state government is subject to the terms of the Federal Employers' Liability Act even though the Act itself in no way specifically mentions that such state should be held subject to such Act. It is further clear from the opinion of the United States Supreme Court that the reasoning followed in so holding was based largely on the fundamental principle that the operation of any railroad is so fraught with dangers to the public and to the employees of such railroad that under the broad commerce power given to the Congress by our Constitution there should be no distinction between government-owned and privately-owned railroads.

We recognize the fundamental rule that no suit may be brought against a sovereign unless the sovereign itself has authorized such suit. We believe that the United States has authorized such suit by giving to the Congress its broad powers over commerce and by the action of Congress in passing the Federal Employers' Liability Act. We fail to see any distinction in this reasoning as opposed to the reasoning by the Supreme Court in holding that the State of California was subject to the terms of the Act. We further earnestly wish to call to the Court's attention the fact that the United States Government acting for its agency the Alaska Railway has recently subjected itself to the terms of the Railway Labor Act by entering into a contract with the Brotherhood of

Railroad Trainmen providing for exact compliance with such Act.

As to any question as to the jurisdiction of this Court in California to try a Federal Employers' Liability Act suit arising out of an accident in Alaska, we wish to call the Court's attention to the case of Panama R. Co. v. Johnson, 264 U.S. 375 at page 384, where the court held that the purpose of the Seaman's Act and the Suits in Admiralty Act was to give seamen relief against the United States in its own courts, regardless of where the action was brought. The decision states:

"The concepts of residence and principal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and unlike private parties is not centered in one particular place. The residence or principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it."

It would seem that a complainant under the Railroad Act would be entitled to even more consideration in determining the proper place of suit inasmuch as Section 56 of said Act holds that the suit may be brought at any place where the employer is engaged in business, whereas, under the Seaman's Act the place of suit is specifically limited to the place of residence of the ship owner or to the place where the vessel could be found. In this action the plaintiff is a resident of the State of California; the government is certainly present in this state and as far as

the equities of the matter are concerned the terrible injuries suffered by plaintiff make it important that he not be required to make the arduous journey to Alaska in order to prosecute his rights.

We respectfully submit that the Motion of defendant should be denied and that defendant be required to make its answer accordingly.

HILDEBRAND, BILLS & McLEOD,

By /s/ SHERIDAN DOWNEY, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 6, 1948.

[Title of District Court and Cause.]

DEFENDANT'S REPLY MEMORANDUM ON MOTION TO DISMISS

Plaintiff in his complaint has sought to invoke the jurisdiction of this Court in the above action against the United States under the Federal Employers Liability Act.

Defendant has not consented to be sued under the Federal Employers Liability Act. Plaintiff can cite no authority for such consent.

Congress has the right to prescribe the terms and conditions upon which the United States of America must be sued.

U. S. v. Sherwood, 312 U. S. 584.
Minnesota v. U. S., 305 U. S. 382.
U. S. v. Fidelity, 309 U. S. 506.

Suit may not be maintained against the United States if not clearly within the statute giving consent and the right to sue the United States is strictly construed.

U. S. v. Sherwood, 312 U. S. 584.

The sovereignty of the United States raises a presumption against its suability unless it is clearly shown, nor should a Court enlarge its liability to suit conferred beyond what the statute requires.

Eastern Transport Co. v. U. S., 272 U. S. 675.

If Congress in certain cases gives its consent the Courts are confined to the letter of the statute which expresses such consent.

Schillinger v. U. S., 155 U. S. 163, 166.

All provisions of such a statute are jurisdictional as the liability and the remedy are created by statute. The limitations of the remedy are regarded as limitations of the right.

The Harrisburg, 119 U. S. 199, 214.
The Insonomia, (C.C.A. 2), 285 Fed. 516, 520.

Congress has given consent for suit against the United States by enacting the Federal Tort Claims Act, and the Court clearly has jurisdiction of the instant case under the Federal Tort Claims Act.

The Court's attention is called to the argument similar to that of plaintiff in the present case, made in the case of Crescitelli v. U. S., 66 F. Supp., 894, aff. 159 F. (2d) 377:

"The libelant argues that he has certain substantive rights under the Jones Act, one of which is the right to commence a suit to recover for his son's death at any time within three years, and that, inasmuch as the Clarification Act gave his son 'all rights * * * under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels', his right of action thereby acquired the three year limitation period of the Jones Act."

The Court granted a Motion to Dismiss on the ground that the action was not filed within two years as required by the Suits in Admiralty Act. In doing so, the following language from decision in The Insonomia, 285 Fed. 516, 520 was adopted:

"In interpreting the Act" (Suits in Admiralty Act), "permitting as it does suit to be brought

against the United States, we must follow the rule of strict construction. This follows from the fact that the United States can not be sued without their consent, and if Congress in certain cases gives its consent, the Courts are confined to the letter of the statute which expresses such consent * * *. And all the provisions of such a statute are jurisdictional. As the liability and the remedy are created by the statute, the limitations of the remedy are regarded as limitations of the right."

See also Kakara v. U. S., 157 F. (2d) 578 (C.C.A. 9th).

It is respectfully submitted that plaintiff must invoke the jurisdiction of this Court under the Federal Tort Claims Act, and not having filed suit within one year as required by said Act, his claim is barred.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 13, 1948.

District Court of the United States, Northern District of California, Southern Division

At A Stated Term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 23rd

day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

ORDER GRANTING MOTION TO DISMISS

The motion to dismiss heretofore having been heard, being now submitted and duly considered, it is Ordered, in accordance with an opinion and order this day signed and filed, that said motion be and the same is hereby granted.

In the United States District Court for the Northern District of California, Southern Division

No. 27710-H

WALTER J. POPOVICH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

In this action plaintiff seeks to recover damages from the defendant, United States, for injuries alleged to have been sustained by him August 26, 1946, in an accident occurring on the Alaska Railroad while employed by defendant, the accident occurring through and as the proximate result of negligence of employees of the defendant, defendant and plaintiff

at the time both being engaged in the conduct of interstate commerce.

This action was commenced on October 22, 1947. Defendant moves to dismiss upon the ground that the action was not begun within one year after the injury was inflicted. It must be conceded upon this motion that if the cause depends solely upon the provisions of the Federal Tort Claims Statute the cause was not seasonably begun and the motion should be granted. Title 28 U.S.C. Sec. 2401. Plaintiff counters with the claim that his cause of action is under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 et seq., rather than under the Federal Tort Claims Statute; that the limitation is therefore three years. 45 U.S. C.A. Sec. 56.

Plaintiff's position appears to be that the Federal Employers' Liability Act applies to all carriers engaged in interstate commerce by rail, and that the defendant United States having engaged in such commcommerce thereby subjected itself to the liabilities of that statute.

Plaintiff leans heavily upon the case of United States v. California, 297 U.S. 175. The State of California owns and operates a railroad along the water front in the City of San Francisco. The United States brought the action to recover a statutory penalty for violation of the Federal Safety Appliance Act. The defendant claimed constitutional immunity. That case is foreign to the question here presented. The commerce provision in the United States Constitution is both a grant and a surrender of power over the field which it covers. The authority of the federal

government therein is exclusive. The sovereign authority of the state has been surrendered to the extent the grant operates. The state is subject to all of the acts of Congress which come into being in the exercise of that power. The case of United States v. California is clearly and expressly bottomed upon this. It is stated therein at page 183: "The only question we need consider is whether the exercise of that power, (power reserved to the states) in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." It was then held that the state was in the same position as an individual and neither could deny the power if its exercise had been authorized by Congress.

It is readily seen that that case is not helpful here. The liability of the United States in the instant action must be resolved by determining whether sovereign immunity has been waived.

Express consent to be subject to liability under the act does not appear. A statute waiving sovereign immunity from suit is in derogation of sovereignty and is subject to strict construction. Moore Ice Cream Co. v. Rose, 289 U.S. 373; United States v. Lindholm, 79 F. 2d 784; Miller v. Pillsbury, 128 p. 327. Sovereignty raises a presumption against suability. Eastern Transport Co. v. United States, 272 U.S. 675. The United States can only be sued by its own consent, clearly given by legislative act. 65 C.J. 1403 and cases

there cited. Prior to the passage of the Federal Tort Claims statute provisions was made by statute for the payment of compensation generally for disability or death of government employees resulting from injuries sustained while in the performance of duties and jurisdiction over claims therefor was given to the United States Employees' Compensation Commission, 5 U.S.C.A. Sections 751 et seq. The Federal Tort Claims Act grants to district courts exclusive jurisdiction over civil actions brought thereunder.

The United States is not ordinarily subject to its own law unless named in it. Guarantee Title & Trust Co. v. Title Guaranty Co., 224 U.S. 152; United States v. Herron, 20 Wall 251; In re Fowble, 213 F. 676. That Congress has legislated protection for injured employees such as plaintiff negatives any implication of consent to sue the United States other than within the remedies provided.

Since consent is absent, this court is without jurisdiction. The motion to dismiss is granted.

Dated December 23rd, 1948.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed Dec. 24, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named plaintiff, Walter J. Popovich, hereby appeals to the United States Circuit Court of Appeals for the Ninth (9th) Circuit from the final judgment and the whole thereof entered in this Court on or about the 24th day of December, 1948.

Dated February 4th, 1949.

HILDEBRAND, BILLS & McLEOD,

By /s/ SHERIDAN DOWNEY, JR.,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 8, 1949.

Fidelity and Deposit Company of Maryland
Home Office, Baltimore

In the District Court of the United States, for the Northern District of California, Southern Division

[Title of Cause.]

The premium charged for this bond is 10.00 Dollars per annum.

Whereas the above named Walter J. Popovich has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree of the District Court of the United States in and for the Northern District of

California, Southern Division, in the above entitled cause.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a corporation, duly organized and existing under the laws of the State of Maryland, and duly authorized and licensed by the laws of the State of California to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Plaintiff that the said Plaintiff will prosecute his said appeal to effect and answer all costs if he fails to make good his plea and appeal not exceeding the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to which amount it acknowledges itself justly bound.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against it and award execution therefor.

Signed, sealed and dated at Oakland, California, this 10th day of February, 1949.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

(Seal) By /s/ A. PHILIP MERRILL,
Attorney-in-Fact and Agent.

State of California,
County of Alameda—ss.

On this 10th day of February, A.D., 1949, before me Elouise Carraher, a Notary Public in and for the County of Alameda, residing therein, duly commissioned and sworn, personally appeared A. Philip Merrill, Attorney-in-Fact and Agent of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same, and also known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact and Agent of said corporation, and he acknowledged to me that he subscribed the name of said Fidelity and Deposit Company of Maryland thereto as Principal and his own name as Attorney-in-Fact and Agent.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Oakland and County of Alameda the day and year first above written.

(Seal) /s/ ELOUISE CARRAHER,
Notary Public in and for the City of Oakland, County of Alameda, State of California.

My commission expires November 17, 1951.

[Endorsed]: Filed Feb. 17, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeal for the Ninth Circuit pursuant to an appeal allowed in the above entitled case, and to include all the pleadings, papers, records and documents in said case.

HILDEBRAND, BILLS & McLEOD,

By /s/ CLIFTON HILDEBRAND,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed March 19, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this court, or true and correct copy of an order entered on the minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the appellant.

Complaint for Damages.

Motion to Dismiss and Notice of Motion.

Defendant's Points and Authorities in Support of Motion to Dismiss Complaint.

Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss.

Defendant's Reply Memorandum on Motion to Dismiss.

Minute Order of December 23, 1948—Granting Motion to Dismiss.

Order.

Notice of Appeal.

Undertaking on Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 19th day of March, A.D. 1949.

(Seal) C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12208. United States Court of Appeals for the Ninth Circuit. Walter J. Popovich, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12208

WALTER J. POPOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF RECORD TO BE PRINTED ON BEHALF OF APPELLANT

Appellant requests the Clerk of the above Court to have all parts of the record printed, including all pleadings and the opinion of the Court in granting respondent's motion to dismiss.

HILDEBRAND, BILLS & McLEOD,

By /s/ SHERIDAN DOWNEY, JR.

STATEMENT OF POINTS ON WHICH APPELLANT WILL RELY IN THIS APPEAL

Appellant appeals from the judgment of the trial court for the following reasons:

That the trial court erred in holding that the United States Government through its operation of the Alaska Railway is not subject to the terms and provisions of the Federal Employers' Liability Act

regulating injuries to employees when injured during the course of employment in interstate commerce.

HILDEBRAND, BILLS & McLEOD,

By /s/ SHERIDAN DOWNEY, JR.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Mar. 29, 1949. Paul P. O'Brien, Clerk.